



DEPARTMENT OF JUSTICE

Perspectives on Cartel Enforcement in the United States and Brazil

THOMAS O. BARNETT
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Address at the
Universidade de São Paulo
São Paulo, Brazil

April 28, 2008

Introduction

Thank you for inviting me to speak with you.¹ One of the most rewarding and enjoyable aspects of my position as the Assistant Attorney General for Antitrust in the United States is to work with my counterparts around the globe, and I'm excited to be here in Brazil to meet with your outstanding antitrust enforcers and to talk with you today.

I will focus my remarks on two areas. First, I'll briefly describe what my agency is doing on the civil side of our antitrust efforts. Second, I'll talk about why and how we have built a successful anti-cartel regime in the United States and share some perspectives on the great progress achieved on this front here in Brazil.

The Department of Justice has a wide range of responsibility in the antitrust arena. Along with our sister agency, the Federal Trade Commission, we handle civil antitrust matters. We review proposed mergers, we investigate and bring cases to challenge anticompetitive conduct, and we also undertake policy efforts to promote competition both in the United States and abroad. On the criminal antitrust enforcement side, the Department of Justice has sole enforcement responsibility, and we focus in this area exclusively on prosecuting hard core cartel activity.

Civil Enforcement

In our last fiscal year, we received filings for 2,200 transactions that were reportable under our merger control system. We also investigated a few transactions that were not reportable. The vast majority of these filings involve mergers that do not threaten harm to competition and may bring affirmative benefits for consumers. Accordingly, we place a high priority on identifying those relatively few mergers that might threaten harm to competition as quickly as possible and on closing our reviews of the others as expeditiously and as efficiently as possible. In the last fiscal year, we challenged 12 proposed mergers because we thought they would harm competition.

When we review a proposed merger, we focus on a few key points.

- First, we try to determine whether combining the firms that are subject to the transaction would allow the resulting firm to unilaterally raise its prices, lower its output, reduce its quality, or otherwise impair competition.
- Second, we examine whether the combined firm would find it easier to coordinate with its remaining competitors.
- Third, while anticompetitive mergers can harm consumers, mergers

often also generate efficiencies that can reduce prices and benefit consumers. Efficiencies generated through a merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For that reason, we also examine the scope and size of any potential efficiencies from the merger.

Each merger we review requires a careful analysis of the specific facts and economic conditions in the relevant markets. Further, the predictive nature of the analysis creates uncertainty. For these reasons, determining the competitive effects of mergers requires sound economic analysis and prudent enforcement decisions. We have our own internal group of over 50 Ph.D. economists who assist the lawyers with our investigative task.

In addition to our merger work, the Antitrust Division investigates potentially harmful monopolization and other single firm conduct, and it is an important part of antitrust enforcement. When a firm unilaterally subverts the competitive process, consumer harm can result. This is the area in which it is most difficult to distinguish between harmful exclusionary conduct and beneficial, albeit tough,

competition. There isn't enough time today for me to discuss all of the relevant issues in unilateral conduct cases. Let me just say briefly that antitrust enforcement should not interfere with the rough and tumble of the marketplace unless and until there is a clear and sound basis for finding harm to competition and an administrable remedy is available that will help competition.

In addition to our merger reviews and anticompetitive conduct investigations, we also have an active policy advocacy effort. We file *amicus* briefs in our Supreme Court and other courts, when appropriate. We offer the benefit of our competition assessments to legislatures when they are considering legislation and policies, and we work with federal and state agencies to help them incorporate robust competition principles into their regulations and policies. We sponsor and participate in conferences where competition issues are relevant, and we meet with our counterparts abroad to share ideas and strategies about all aspects of competition law enforcement.

Criminal Cartel Enforcement

On the criminal side, I will talk about why prosecuting hard core cartels is such a high priority for us and how our cartel amnesty and settlement programs have

helped us uncover cartels and prosecute their members.

We believe that detecting and prosecuting cartels should be the highest priority of an antitrust enforcement agency. Why do cartels deserve such attention? Put quite simply, cartels impose enormous costs on consumers with no corresponding benefit to anyone but the cartelists. The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities in both the United States and Brazil properly regard cartel behavior as *per se* illegal or a “hard core” violation of the competition laws. I understand that in Brazil, cartels can be pursued either criminally or administratively. If a criminal prosecution is pursued, individual defendants may receive up to five years in prison. In the United States we prosecute hard core cartels exclusively as criminal violations, and we encourage other countries to do the same.

Cartels can be highly profitable, so they can only be deterred through vigorous prosecution and severe sanctions. Most cartels conduct their activities secretly. They do not host open meetings to fix prices; nor do they advertise in press releases that they have allocated markets. Moreover, cartelists have become increasingly adept at avoiding the creation of documentary evidence – as well as at

destroying evidence once they fear the enforcers may be suspicious of them. They often adopt code names, use pre-paid calling cards, and falsify documents.

Leniency and Settlement Programs

Because cartels are so difficult to detect and prosecute, we have developed a robust cartel amnesty program that encourages cartel members to voluntarily confess cartel conduct. You may wonder: if cartels are so harmful, why would we create an amnesty program that shields cartelists from prosecution? The answer is a simple matter of incentives. Cartels are extraordinarily difficult to detect or prosecute successfully even if detected. By creating a program that offers amnesty to the first cartel member to confess, we give them an incentive to come forward and provide evidence that allows us to prosecute co-conspirators vigorously. Such programs are the greatest investigative tool ever designed to fight cartels.

In the United States, our amnesty program encourages cartel members to come forward, confess their cartel activity, and assist us in investigating and prosecuting their fellow cartel members. In exchange, they receive amnesty for their own cartel behavior. The company pays no fine. Its culpable executives do not go to jail. The key is that only one company can qualify for leniency. A company that is

second in the door — even if by only a matter of days or hours, as has been the case on a number of occasions — will not be eligible for leniency.

We also have a settlement program for those who do not qualify for the leniency program. Companies that come forward after the leniency applicant and offer to cooperate may have the opportunity to enter into plea agreements and have their fines reduced. Such cartel settlement programs have become a significant topic internationally. Two weeks ago, I was in Japan for the International Competition Network's annual conference, and the ICN's Cartel Working Group issued a report on cartel settlement programs in conjunction with the conference. As the report says, "settlements are regarded by many as a 'win-win' anti-cartel enforcement tool that can provide a multitude of benefits to enforcers as well as to settling cartel participants."²

Brazil has leniency and settlement programs that are similar in many ways to those in the United States. Your leniency program, launched in 2000, offers full immunity to the first cartel member to confess or, if your enforcers were already aware of the cartel, sometimes partial immunity to the first cartel member to come forward. The program has obviously been successful: Ana Paula Martinez, the head of the

Competition Division at SDE, reported that 8 of the 10 major cartel investigations being handled by SDE as of last fall were initiated by leniency agreements.

A year ago, Brazil introduced its own Cartel Settlement Program, through an amendment to your Antitrust Law. Under this new program, CADE can enter into settlements with companies that participated in a cartel but lost the race to be the first to apply for leniency. I agree with what your antitrust agencies have said in their statements about the program, that it “represents a remarkable improvement: early cooperation on the part of the defendants will save public resources, cut down litigation, enable early payment of a significant sum of money, and provide expedited treatment and more certainty and transparency to the business community. The possibility of settling a case early on allows SDE to focus on other investigations.”³ Those are exactly the reasons we have a similar settlement program in the United States – the program helps us conserve scarce resources while continuing to build cases against other members of the same cartel.

The ICN report took note of Brazil’s new cartel settlement program and highlighted that it led to Brazil’s first four settlements in 2007.

Let me tell you about the results from our leniency and settlement programs in the United States. In fiscal year 2007, the Antitrust Division of the Department of Justice obtained fines of over \$630 million. That's over a billion Brazilian reais.⁴ Even more importantly, we think, our courts have imposed significant jail terms for those prosecuted for cartel offenses. In fiscal year 2007, defendants prosecuted by the Antitrust Division were sentenced to serve 31,391 jail days. This 2007 number set a new record for us, as it is more than double our previous record for jail days, which we achieved in fiscal year 2005.

Many of our defendants who serve jail terms for their cartel behavior are American citizens, but in fiscal year 2007, we set another record: longest individual jail sentence for a foreign national violating the US antitrust laws. Before this new record, the longest such sentence was 8 months. In May 2007, a Korean executive was sentenced to serve 14 months in prison for his participation in the international Dynamic Random Access Memory (DRAM) price-fixing cartel. In November 2007, two French nationals agreed to plead guilty and serve 14 month jail sentences for their participation in the international marine hose cartel. In December, 2007, the Division filed plea agreements with three British participants in that same marine hose cartel, calling for agreed-upon 30-month, 24-month, and

20-month prison sentences.

The success of our cartel program is directly related to our leniency and settlement programs. There are two principles of those programs and of our entire anti-cartel regime that I would like to highlight for you today, as they are particularly important to our efforts to stop cartels. They are: (1) the imposition of severe sanctions, and (2) the availability and use of strong investigative powers.

Severe Sanctions

Let me start with severe sanctions. Penalties for cartel behavior should reflect that cartels inflict enormous consumer harm⁵, with no corresponding efficiency gains. In order to deter cartel behavior, the expected penalties need to outweigh the expected rewards. Cartelists' motivation is financial, and cartelists are quite capable of factoring in the risk of detection and the potential penalties if caught as factors in operating their cartel. Therefore, cartel penalties should not only be large enough to remove the financial incentives to participate in a cartel but also should look past financial incentives through fines to direct impact on the cartel members themselves: substantial jail time for responsible individuals. Jail time creates the most effective, necessary deterrent. In this regard, I am pleased to

count Brazil among those nations that have characterized hard core cartel behavior as criminal conduct, with violators subject to jail sentences.

One aspect of ensuring severe sanctions for cartels warrants further elaboration: the terms of settlement. As I previously observed, settlements are critical tools for effective cartel enforcement, but only if the terms of the settlement are appropriate. Let me give you an example: we always require the defendants we settle with for hard core cartel violations to make a criminal admission of guilt. We do this because it is necessary to establish the seriousness of the violation. If we did not require an admission of guilt, the public – and perhaps even the company involved in the cartel itself – might view the decision to settle as a means of resolving a “nuisance” claim that was not worth the time and effort to dispute. But pleading guilty indicates that the defendant company or individual has taken full responsibility for its actions and acknowledges the severity of the conduct. Requiring an admission of guilt in cartel conduct is consistent with the sentiment that cartels are the most egregious and harmful violations of competition law.

In addition, permitting some cartel defendants not to admit guilt inevitably will raise questions of fairness across defendants. Those who have pleaded guilty may

claim they were treated unfairly compared to others who are not required to do so. Such concerns can undermine the incentives to apply for leniency in the first instance.

Moreover, one of the key benefits of settlements to enforcement agencies is obtaining the cooperation and evidence from the settling defendant. The settlement saves us from using further time and resources to prosecute the defendant while providing evidence against co-conspirators. If, however, a defendant is permitted to settle without admitting guilt, that company will have incentives not to cooperate with the agency's continuing investigation.

Last fall, CADE passed a resolution to require an admission of guilt if a case was initiated using evidence obtained under a leniency agreement.⁶ I want to encourage your antitrust officials to continue to require cartelists to admit their guilt and cooperate and to refer cases to state and federal criminal prosecutors with strong recommendations for all available criminal penalties in appropriate cases.

Let me elaborate further on why I think it is important to pursue guilty pleas and jail time.

First, our investigators have found that nothing in our enforcement arsenal has as great a deterrent as the threat of substantial jail time in a United States prison, either as a result of a criminal trial or a guilty plea. We have, for example, encountered international cartels where the participants purported to carve the United States out of their price fixing. The reason given was fear of prison sentences. The United States Congress recently raised the maximum jail term for cartel offenses, so members of cartels that began or continued their activities on or after June 22, 2004 now face a possible ten years in jail. As compared to the old maximum of three years in jail, that is a significant increase, and it helps us negotiate longer jail sentences in plea agreements. The message we are sending to cartel members is a clear one: if you participate in price fixing, market allocations, bid-rigging, output allocations, or other “hard core” cartel activities, and if you are caught, it is very likely that you will go to jail and that you will stay there for many months.

Second, the existence of strong sanctions for cartelists is critical not just because the punishment should fit the egregiousness of the crime but also because it creates an incentive for cartel members to seek the protections of our amnesty program. Severe sanctions for firms and individuals that do not obtain amnesty makes

cartelists more likely to seek amnesty. This is especially true if the amnesty program provides significant benefits compared to the firm's alternative strategies: continuing to participate in the cartel or withdrawing but remaining silent. Faced with the prospect of a significant criminal fine for the corporation and jail time for culpable company executives, companies who are engaged in cartel activities may well decide that it is in their best interest to apply for amnesty and then confess and turn over evidence against their co-conspirators.

Strong Investigative Tools

A few minutes ago, I said that our increased jail sentences send a message that “if you are caught,” you are likely to go to jail for many months. Well, the second aspect of our system that I would like to highlight for you is the strong investigative powers we have to pursue cartels. Those strong investigative powers allow us to increase the likelihood that cartels are uncovered and that the cartelists and their employers are successfully prosecuted. Our goal is to instill a genuine fear of detection and punishment among cartelists. Strong investigative tools and our amnesty program, working together, create a virtuous cycle that increases the odds of uncovering cartels. When cartel members perceive a genuine risk of detection, then an amnesty program can build on that fear and create distrust and

panic among the cartel members. The cartel members no longer trust one another. The rewards for self-reporting are too great, and the consequences of getting caught too severe. The dynamic creates a race to be the first to the antitrust enforcer's office.

For example, consider a scenario where five members of a cartel are scheduled to hold a price fixing meeting. When the meeting starts, there is an empty seat at the table. One of the conspirators has not returned calls and has unexpectedly not arrived at the meeting. Each of the cartel members at the meeting starts to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he or she already reported the others to the government? Or was it just a missed plane? In this environment, with the risk of detection and the stakes so high, who can you trust? Each member of a cartel knows that any one of the co-conspirators can report the others in exchange for amnesty — a decision that will seal their fate. Imagine the vulnerability of being in that position and asking yourself, “Can I really trust my competitors to look out for my best interests?”

This virtuous cycle hinges on having the tools to detect cartels, because without a likelihood of being discovered, there is little incentive to self-report. In the United

States, we use a full range of investigatory techniques, from search warrants to wiretaps to informers wearing recording devices. We involve FBI agents who are specially trained in criminal interrogation, forensics, and detection of corporate fraud. We also use Interpol “Red Notices,” border watches, and extradition to track and, where appropriate, detain cartelists traveling outside the United States. Using our full panoply of tools increases the likelihood of uncovering cartels even without our amnesty program, and that likelihood creates incentives for cartel members to report their cartel behavior before we discover it ourselves.

Before I conclude my remarks and answer questions, let me also say a few words about the globalization of cartel enforcement. We collaborate across borders with many nations on efforts to break up cartels, and I think it is safe to say that now is the most dangerous time in the history of the world for companies to enter into cartels, given the breadth and depth of international collaboration in cartel enforcement and the increasingly severe sanctions. Many of the cartels that we investigate today have significant international components to them, whether it is that the cartel includes non-US companies, or that evidence is located abroad, or that some of the cartel activities take place in other countries. A shared commitment to fighting international cartels has led to the establishment of

cooperative relationships among antitrust enforcement agencies around the world.

The recent investigation we had into the marine hose industry is a good example of international cooperation in fighting cartels. Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys. Marine hose is purchased by companies that are involved in the off-shore extraction and transportation of petroleum products. It is also purchased and used by the U.S. Department of Defense. Almost exactly a year ago, on May 2, the Antitrust Division and the FBI arrested eight foreign executives from the United Kingdom, France, Italy and Japan for their roles in the marine hose conspiracy and conducted multiple searches in the U.S. On the same day, U.K. and European antitrust authorities searched locations in Europe. The Japan Fair Trade Commission later searched locations in Japan in its investigation in this industry. One of your competition agencies, the SDE, announced last November that it is investigating this same cartel. Such cases illustrate the compelling need for international cooperation on cartel matters, and I'm pleased to count Brazil among the countries that cooperates with us and shares our focus on anti-cartel enforcement.

Thank you for the opportunity to speak to you today, and I look forward to your

questions.

1. I thank Avery Gardiner for her help in preparing these remarks. I remain solely responsible for the accuracy of the contents.
2. “Cartel Settlements: Report to the ICN Annual Conference,” April 2008, available at: http://www.icn-kyoto.org/documents/materials/Cartel_WG_1.pdf
3. <http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>.
4. Based on April 10, 2008 exchange rate of 1 USD to 1.6909 BRD.
5. *See generally* Organization for Economic Cooperation and Development, 2002 Report on the Nature and Impact of Hard core Cartels and Sanctions Against Cartels Under National Competition Laws, at <http://www.oecd.org/dataoecd/16/20/2081831.pdf>, Annex A (collecting estimates of consumer harm from numerous cartels).
6. Description of Brazil’s Leniency Program, February 2008, published by the Ministry of Justice, at pages 11-12, available at <http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>